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Nos. 90-408 and 90-577

In The
Supreme Court of the United States
October Term, 1990

COUNTY OF YAKIMA, et al., PETITIONERS
v.
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA NATION, RESPONDENT

CONFEDERATED TRIBES AND BANDS OF THE OF THE YAKIMA NATION, CROSS-PETITIONER
v.
COUNTY OF YAKIMA, et al., CROSS-RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF MONTANA, COLORADO, MINNESOTA, NORTH DAKOTA, AND SOUTH DAKOTA IN SUPPORT OF PETITIONERS/CROSS-RESPONDENTS

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Amici curiae States of Montana, Colorado, Minnesota, Montana, North Dakota and South Dakota, through their respective Attorneys General, respectfully submit pursuant to S. Ct. R. 37.5 a brief in support of the petitioners/cross-respondents' position with respect to the authorization under section 6 of the General Allotment Act, 25 U.S.C. § 349, for states to impose property taxes on lands patented in fee thereunder and the inapplicability of *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408 (1989), to determining the scope of such authorization.

INTEREST OF AMICI CURIAE

Each amicus curiae State contains one or more Indian reservations in which land was allotted and eventually patented in fee under the General Allotment Act of 1887. All currently impose, or desire to impose, ad valorem taxes on such land even if owned by tribes or their members. Three amici States are presently involved in judicial or administrative proceedings seeking to invalidate such taxation.[1] While the aggregate amount of affected taxes in the amici States has not been calculated, it is almost certainly substantial.

Beyond the very practical fiscal interest the amici States possess in maintaining or expanding present property tax bases, they have a more generalized concern

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[1] *United States v. South Dakota*, No. 90-301 (D.S.D.); *Assiniboine and Sioux Tribes v. Montana*, No. CV-89-271-BLG (D. Mont.); *Blackfeet Tribe v. Adams*, No. CV-89-100-GF (D. Mont.); *Cook v. LaPlata County Bd. of Comm'rs*, No. 12825 (Colo. St. Bd. of Assessment Appeals).

in the development of coherent decisional law relating to the taxation powers of state and local governments on Indian reservations. This matter involves an instance in which, as the Court of Appeals concluded, Congress has expressly authorized the taxation of lands within such reservations. The court below nonetheless remanded the proceeding for further preemption analysis under the plurality opinion in *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408 (1989), to determine whether such "taxation would affect [the Yakima Nation] in a demonstrably serious way[.]" *Confederated Tribes and Bands of Yakima Nation v. County of Yakima*, 903 F.2d 1207, 1218 (9th Cir. 1990); Petition at 28a. The Court of Appeals' analysis in the latter regard contemplates at least the possibility of judicially developed principles superseding an explicit statement of congressional will in an area where Congress has unquestioned supremacy. Aside from the manifest impropriety of arrogating such power to the courts, the proposed *Brendale* analysis would embroil states, tribal taxpayers and, more than likely, the federal government in complicated, repetitive litigation.

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SUMMARY OF ARGUMENT

The General Allotment Act embodied an effort to dissolve the political relationship between tribes and their members. The touchstone of this effort was allotment in severalty of lands to individual members for a 25-year trust period, after which fee patents were to be issued. Under section 6 of the Act as originally adopted, allottees were given upon completion of the allotment and patenting process the benefit of, and made subject to, "the laws, both civil and criminal of the State or Territory in which [they] may reside" and made citizens of the United

States. Act of Feb. 8, 1887, § 6, 24 Stat. 388, 390. In response to *In re Heff*, 197 U.S. 488 (1905), Congress amended section 6 in 1906 to substantially its present form and rendered allottees subject to state or territorial law only upon issuance of fee patents. The 1906 amendment additionally gave the Secretary of the Interior the power to issue a fee patent "whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs" and provided that, upon the patent's issuance, "all restrictions as to sale, incumbrance, or taxation of said land shall be removed[.]" Act of May 8, 1906, 34 Stat. 182, 183 (codified in part at 25 U.S.C. § 349).

Over the 40 years following the 1906 amendment, a significant body of decisional law developed concerning whether land patented in fee could be taxed by state and local governments. The issue in that litigation, however, was not whether section 6 constituted congressional consent to such taxation -- since no one disputed that it did -- but whether allottees had consented to such taxation during that portion of the original trust period remaining after the fee patent issued. Cases involving the identical question also arose under other reservation-specific legislation comparable to the amended section 6, the most important of which was *Mahnomen County v. United States*, 319 U.S. 474 (1943). *Mahnomen County*, like the section 6 cases, assumed the existence of congressional consent to the challenged state tax and dealt only with the consent issue.

The purposes attendant to the General Allotment Act's passage and subsequent amendment, the literal language of the 1906 amendment itself, and the ensuing litigation over whether allottee consent to taxation during the original trust period had occurred all point to the conclusion that section 6 as amended authorizes states to

tax allotted lands upon issuance of a fee patent irrespective of the taxpayer's status as a tribe or tribal member. This conclusion is not altered by termination of the allotment process in the Indian Reorganization Act, Act of June 18, 1934, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479), the 1948 recodification of Title 18 of the United States Code in which a definition for Indian country was added, or *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976). The Court of Appeals therefore correctly held that section 6 permitted the petitioners/cross-respondents to impose the challenged property tax.

The Court of Appeals, however, erred in remanding the proceeding for further consideration in light of the plurality opinion in *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408 (1989). *Brendale* involved the question whether a tribe had inherent power to impose its zoning ordinance on nonmember-owned properties. No issue concerning such power is implicated by the taxation here, whose propriety all parties and amici curiae agree must be determined by whether section 6 contains a requisitely clear congressional authorization to tax. The lower court accordingly should have remanded the proceeding with instructions to dismiss the respondent/cross-petitioner's claim directed to the Washington property tax.

ARGUMENT

I. SECTION 6 OF THE GENERAL ALLOTMENT ACT, AS AMENDED IN 1906, EXPRESSLY CONSENTS TO STATE TAXATION OF ALLOTTED LANDS UPON ISSUANCE OF A FEE PATENT.

A.

Individual treaties have provided for the allotment[2] of reservation or other lands to tribal members,[3] but the General Allotment Act of 1887 was the first statute of general application to authorize individual allotments. Act of Feb. 8, 1887, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354). The statute was viewed at the time of its enactment as reformist legislation, designed to remedy past wrongs to Indians by making it possible for them to become economically self-sufficient and thereby independent of their tribes:

> The supreme aim of the friends of the Indian was to substitute white civilization for his tribal culture, and they shrewdly sensed that the difference in

[2]"Allotment is a term of art in Indian law. ... It means a selection of the specific land awarded to an individual allottee from a common holding." *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 142 (1972) (citation omitted).

[3]*See generally* F. Cohen, *Handbook of Federal Indian Law* 63-64 (1942) (discussing allotment provisions in treaties negotiated between 1854 and 1861). Several removal-related treaties also authorized allotment to individual members of lands ceded under their provisions. *E.g.*, Dec. 29, 1835 Treaty with Cherokee Tribe, art. 12, 7 Stat. 478, 483-84 (1836); Mar. 24, 1832 Treaty with Creek Tribe, arts. II, V, 7 Stat. 366 (1832).

> the concepts of property was fundamental in the contrast between the two ways of life. That the white man's way was good and the Indian's way was bad, all agreed. So, on the one hand, allotment was counted on to break up tribal life.
>
> ***
>
> On the other hand, the allotment system was to enable the Indian to acquire the benefits of civilization. The Indian agents of the period made no effort to conceal their disgust for tribal economy.

D. Otis, *History of the Allotment Policy, reprinted at Readjustment of Indian Affairs: Hearings on H.R. 7902 Before House Committee on Indian Affairs*, 73d Cong., 2d Sess. 430 (1934) ("*Readjustment of Indian Affairs*"); *see also II* F. Prucha, *The Great Father* 659 (1984) ("II F. Prucha") ("Allotment of land in severalty ... was part of the drive to individualize the Indian that became the obsession of the late nineteenth-century Christian reformers and their friends in government and did not stand by itself. The breakup of tribalism, a major goal of this Indian policy, had been moved forward by the abolition of the treaty system and would be carried on by a government educational system and by the extension of American law over the Indian communities. Yet for many years the dissolution of communal lands by allotment, together with the citizenship attached to private landowning, was the central issue"). The Court has thus commented that "[t]he objects of [the allotment] policy were to end tribal land ownership and to substitute private ownership, on the view that private ownership by individual Indians would better advance their dissimilation as self-supporting members of our society and relieve the Federal Government of the need to continue supervision of Indian affairs." *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 650 n.1

(1976); *see also United States v. Montana*, 450 U.S. 544, 559 n.9 (1981) (observing that "[t]he policy of the [various allotment acts] was the eventual assimilation of the Indian population ... and the 'gradual extinction of Indian reservations and Indian titles'" and that, "throughout the congressional debates, allotment of Indian lands was consistently equated with the dissolution of tribal affairs and jurisdiction").

The General Allotment Act accomplished these purposes by directing the President, "whenever in his opinion any reservation or any part thereof ... is advantageous for agricultural and grazing purposes," to allot specified quantities of reservation land to tribal members. Act of Feb. 8, 1887, § 1, 24 Stat. 388 (codified as amended at 25 U.S.C. § 331). Upon approval of an allotment, a trust patent issued "declar[ing] that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever[.]" *Id.*, § 5, 24 Stat. 389 (codified as amended at 25 U.S.C. § 349). Section 6 of the original statute granted citizenship, *inter alia*, to allottees "upon the completion of said allotments and the patenting of the lands" and, at such time, made them subject "to the laws, both civil and criminal, of the State or Territory in which they may reside[.]" *Id.*, § 6, 24 Stat. 390.

Although there was some ambiguity over whether section 6, as enacted in 1887, conferred citizenship upon issuance of the trust patent or issuance of the fee patent,

the Court held in 1905 that an allottee became a citizen, and therefore subject to state or territorial law, upon receipt of the trust patent. *In re Heff*, 197 U.S. 488 (1905). In so holding, the Court reversed a conviction under federal law for selling alcohol to an allottee who had received only a trust patent.[4] The congressional response to *Heff* was the 1906 amendment to section 6. Act of May 8, 1906, 34 Stat. 182 (codified in part at 25 U.S.C. § 349).[5] The House report accompanying the bill

[4]The involved federal statute, Act of Jan. 30, 1897, 29 Stat. 506, prohibited sale of alcohol "to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the government[.]" The Court rejected the Solicitor General's suggested interpretation that section 6 conferred citizenship status only upon issuance of a fee patent and then concluded that the statute was unenforceable insofar as it attempted through exercise of federal police power to regulate "'the internal trade of the States'". 197 U.S. at 507 (quoting from *United States v. Dewitt*, 76 U.S. (9 Wall.) 41, 45 (1869). It further concluded that federal regulatory power did not exist under the Indian Commerce Clause once an Indian was "emancipated from federal control" by the grant of citizenship and subjection to state law. *Id.* at 509. The last aspect of *Heff* was overruled in *United States v. Nice*, 241 U.S. 591, 601 (1916).

[5]In relevant part the 1906 amendment read:

> That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act, each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this Act or under any law or treaty, and every Indian born

(continued...)

adopted without substantive modification as the amendment stated that, since *Heff*, "there has been more or less demoralization among the Indians, as most of them have taken allotments and liquor has been sold to them, regardless of the fact that they are Indians" and deemed it "advisable that all Indians who may hereafter take allotments be not granted citizenship during the trust period, and that they shall be subject to the exclusive jurisdiction of the United States." H.R. Rep. No. 1558, 59th Cong., 1st Sess. 2 (1906). The report continued on:

[5](...continued)

> within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property: *Provided*, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said lands shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States: *And provided further*, That the provisions of this Act shall not extend to any Indians in the Indian Territory.
>
> 34 Stat. 182-83.

> The bill also provides and authorizes that the Secretary of the Interior, in his discretion, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her own affairs, may cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, encumbrance, or taxation of said lands shall be removed, and if that should be done it would follow as a matter of course, under the provisions of this bill, that the allottee would then become a full citizen and no longer subject to the exclusive jurisdiction of the United States.

The latter aspect of the amendment was viewed by the Commissioner of Indian Affairs as "perhaps the most important in the bill":

> It is a long step in the right direction, and the great need of such a provision is apparent under existing law, and it would become all the more urgent if the other provisions of the pending bill should be enacted. There are many members of Indian tribes, full bloods, mixed bloods, and in some instances adopted white men, who are entirely competent to transact their own business and take their places in the ranks of our common citizenship. If such allottees are given full control of their property they will be absorbed into the community in which they reside and bear their share of its burdens, while at the same time the number of "wards of the Government" will be gradually reduced. The process, however, is well safeguarded. Before a fee-simple patent is issued the bill makes it the duty of the Secretary of the Interior to satisfy himself of the civic competency of the allottee concerned.

Id. at 4. Removal of the restrictions against alienation, encumbrance and taxation was thus viewed by both the House Committee on Indian Affairs and the Department of the Interior as an adjunct to the status of a fee-patented allottee as a citizen who, having been deemed capable of managing his affairs like other citizens, not only possessed the right to control disposition of his land but also was expected to bear the ordinary obligations, such as taxation, attendant to property ownership. *Accord* S. Rep. No. 1998, 59th Cong., 1st Sess. (1906).[6]

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[6]The provision for removal of restrictions on alienation and taxation simply made explicit what had otherwise been established in *United States v. Rickert*, 188 U.S. 432 (1902). There the Court determined that state taxes could not be assessed against lands allotted under the General Allotment Act while still held in trust by the United States:

> If, as is undoubtedly the case, these lands were held by the United States in execution of its plans relating to Indians, -- without any right in the Indians to make contracts in reference to them, or to do more than occupy and cultivate them, -- until a regular patent conveying the fee was issued to the several allottees, it would follow that there was no power in the state of South Dakota, for state or municipal purposes, to assess and tax the lands in question until at least the fee was conveyed to the Indians. These Indians are yet wards of the nation, in a condition of pupilage or dependency, and have not been discharged from that condition. They occupy these lands with the consent and authority of the United States; and the holding of them by the United States under the act of 1887, and the agreement of 1889, ratified by the act of 1891, is part of the national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life, and ultimately the privilege of citizenship. To tax these lands is to tax an instrumentality employed by the United States for the benefit and control of this dependent race[.]

(continued...)

B.

There can thus be no legitimate dispute over Congress's objective with respect to the first proviso to section 6: Once a fee patent issued for certain land, it became both capable of conveyance at the owner's discretion and subject to taxation. That the proviso constituted congressional consent to taxation is reflected vividly in a long series of decisions concerned with whether state taxes could be applied during that portion of the original 25-year trust period remaining after issuance of a fee patent.

Under an 1897 agreement incorporated into statute, Choctaw and Chickasaw tribal members were allotted shares of land set aside for their benefit in the Oklahoma Territory. Act of June 28, 1898, § 29, 30 Stat. 495, 505. The agreement provided that all such land was nontaxable for a period of 21 years while in the allottee's ownership but permitted alienation of specified portions of the land at various intervals. *Id.*, 30 Stat. 507. Congress later enacted legislation removing all restrictions as to alienation

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[6](...continued)

Id. at 437; *see also United States v. Mitchell*, 445 U.S. 535, 544 (1980) ("[i]t is plain ... that when Congress enacted the General Allotment Act, it intended that the United States 'hold the land ... in trust' ... because it wished to prevent alienation of the land and to ensure that allottees would be immune from the state taxation"). This aspect of *Rickert* was referred to during the House debate on the section 6 amendment. 40 Cong. Rec. 3599 (1906) (remarks of Rep. Curtis). The notion that the privilege of alienability normally carried with it the obligation to pay state taxes was reiterated shortly after the 1906 amendment's adoption in *Goudy v. Meath*, 203 U.S. 146, 149 (1906), where the Court in part sustained application of Washington property taxes to on-reservation land owned in fee by a tribal member on that basis.

and taxation of lands of the type subject to allotment under the 1897 agreement. Act of May 27, 1908, 35 Stat. 312. When Oklahoma attempted to tax those lands on the basis of the subsequent statute, the Court held in *Choate v. Trapp*, 224 U.S. 665 (1912), that the agreement's immunity against taxation was a property right vested within the various allottees which was not diminished by the more general statute:

> Restrictions on alienation were removed by lapse of time. [The allottee] could sell part after one year, a part after three years, and all except homestead after five years. The period of exemption was not coincident with this five-year limitation. On the contrary, the privilege of nontaxability might last for twenty-one years, thus recognizing that the two subjects related to different periods and that neither was dependent on the other. The right to remove the restriction was in pursuance of power under which Congress could legislate as to the status of the ward and lengthen or shorten the period of disability. But the provision that the land should be nontaxable was a property right, which Congress undoubtedly had the right to grant. That right fully vested in the Indians and was binding upon Oklahoma.

Id. at 673. *Choate* did not address whether a restriction against taxation could be removed by an allottee taking affirmative action to have a fee patent issued or whether an allottee could recover taxes voluntarily paid on fee land otherwise subject to such a restriction. However, in *Sweet v. Schock*, 245 U.S. 192 (1917), the Court indicated that a tax exemption could be forfeited upon application for

issuance of a fee patent,[7] and in *Love v. Board of County Commissioners*, 253 U.S. 17 (1920), it recognized that state taxes voluntarily paid by an allottee on fee land subject to a restriction against taxation could not be recovered.[8] The reasoning in *Choate*, *Sweet* and *Love* was thereafter extended expressly or implicitly to situations where, pursuant to his section 6 authority, the Secretary issued fee patents to allottees before expiration of the 25-year trust period, with courts resolving the taxation issue by reference to whether the allottee had consented to issuance of the fee patent or voluntarily paid the state taxes. *Compare Glacier County v. United States*, 99 F.2d 733 (9th Cir. 1938) (finding no consent and therefore no state taxation authority); *United States v. Lewis County*, 95 F.2d 236 (9th Cir. 1938) (same); *United States v. Nez Perce County*, 95 F.2d 232 (9th Cir. 1938) (same); *Board of Commissioners v. United States*, 87 F.2d 55 (10th Cir. 1936) (same); *and United States v. Benewah County*, 290 F. 628

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[7]The specific issue in *Sweet* was the taxable status of land allotted to a member of the Creek Tribe and later conveyed to nonmembers. Prior to the first of these conveyances, the allottee requested removal of the restriction against alienation. 245 U.S. at 193-94. At the time of this request a statute, Act of Apr. 26, 1906, § 19, 34 Stat. 137, 144, provided that removal of the alienation restriction would render the affected land taxable. The Court held the conveyed land subject to taxation, remarking in part that the Creek member, in accepting the fee land free of restrictions, "did so under the conditions imposed by [applicable] laws[.]" *Id.* at 196.

[8]*Love* involved members of the Choctaw Tribe who had paid property taxes on allotted lands subject to the same restrictions at issue in *Choate*. Although the Court "accepted so much of the [Oklahoma] Supreme Court's decision as held that, if the payment was voluntary, the moneys could not be recovered in the absence of a permissive statute," it found the "decision that the taxes were paid voluntarily ... without any fair or substantial support." 253 U.S. at 22, 23.

(9th Cir. 1923), *with United States v. Glacier County*, 74 F. Supp. 745 (D. Mont. 1947) (finding consent and therefore state taxation authority); *and Chatterton v. Lukin*, 154 P.2d 798 (Mont. 1945) (same); *see also County of Thurston v. Andrus*, 586 F.2d 1212, 1219-20 (8th Cir. 1978), *cert. denied*, 441 U.S. 952 (1979) (collecting various federal and state cases on the consent question).

The Court itself addressed the consent issue in *Mahnomen County v. United States*, 319 U.S. 474 (1943), under a 1906 statute applicable in part only to the White Earth Reservation. Act of June 21, 1906, 34 Stat. 325. The statute, enacted six weeks after the section 6 amendment, stated "[t]hat all restrictions as to the sale, encumbrance or taxation for allotments with the White Earth Reservation in the State of Minnesota, now or hereafter held by adult mixed-blood Indians, are hereby removed, and the trust deeds heretofore or hereafter executed by the Department for such allotments are hereby declared to pass the title in fee simple, or such mixed bloods upon application shall be entitled to receive a patent in fee simple for such allotments[.]" 34 Stat. 353. Pursuant to this statute restrictions against alienation and taxation were removed when an allottee, on whose behalf the United States sued, reached majority in 1911, and she commenced paying state property taxes. Because her trust patent had issued in 1902 with a 25-year trust period contemplated, the United States initiated an action in 1940 to recover only tax payments made between 1911 and 1927, conceding that any limitation on the county's power to tax the property expired in 1928 with the termination of the 25-year trust period. 319 U.S. at 475. The Court concluded that all of the challenged taxes had been paid voluntarily, observing that 1911-1921 payments had been made without protest and that the allottee had entered into a settlement agreement with respect to 1922-1927 taxes, "for which tax exemption is claimed, [and] for

the years 1928-34, for which there is no conceivable claim of exemption." *Id.* at 478. Justice Murphy dissented on the consent question, but he also recognized the 1928-1934 taxes were "admittedly due." *Id.* at 483 (Murphy, J., dissenting). There was, in sum, unanimity among the parties and on the Court that the challenged taxes could be assessed outside the 25-year trust period -- and even within such period if consent existed.

Thirteen years after *Mahnomen County* the Court again acknowledged the evident purpose of section 6's first proviso. In *Squire v. Capoeman*, 351 U.S. 1 (1956), the issue was whether federal capital gain taxes for the year 1943 were required to be paid on proceeds from the sale of timber harvested from allotted lands still held in trust. The Court determined that "the promise to transfer the fee 'free from all charge or incumbrance'" in section 5 of the General Allotment Act precluded even federal taxation. In reaching this conclusion, it remarked that the first proviso in section 6 "gave additional force" to the allottee's claimed exemption and reasoned:

> The Government argues that this amendment was directed solely at permitting state and local taxation after a transfer in fee, but there is no indication in the legislative history of the amendment that it was to be so limited. ... The literal language of the proviso evinces a congressional intent to subject an Indian allotment to all taxes only after a patented fee is issued to the allottee. This, in turn, implies that, until such time as the patent is issued, the allotment shall be free from all taxes[.]

Id. at 7-8 (footnote omitted). The Court further stated that two Attorney General's opinions and Felix Cohen's 1942 Indian law treatise, all of which supported the

federal tax's inapplicability, were "entitled to consideration" as "relatively contemporaneous official and unofficial writings[.]" *Id.* at 9. Here, both a 1924 Department of the Interior opinion[9] and the Cohen treatise[10] support the validity of the Washington tax's application to lands allotted under the General Allotment Act and now held in fee by the respondent/cross-petitioner or its members. The Court's analysis in *Squire*, finally, is singularly ironic since it specifically rejected the United States' position that the proviso applied *only* to state and local taxation --a position which the Government now argues directly against. Brief for United States as Amicus Curiae at 11-13.

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[9]50 L.D. 691, 694 (1924) ("[w]hen an allottee voluntarily applies for a removal of restrictions [by requesting issuance of a fee patent] prior to the expiration of the period of exemption originally provided for, the granting of such application subjects those lands to taxation even in the hands of the original allottee"); *accord* 53 I.D. 133 (1930).

[10]F. Cohen, *supra* note 3, at 259 ("[s]hould [an allottee] ... apply for the issuance of a fee patent and be accorded one [under the General Allotment Act], there seems no reason to believe that his lands would not thereby be subject to state taxation"); *accord* United States Dep't of Interior, *Federal Indian Law* 859 (1958).

C.

That the section 6 proviso satisfies the decisionally-developed principle that state taxation of reservation-based activities or property of tribes and their members must be clearly authorized by Congress[11] would therefore seem incontrovertible. The respondent/cross-petitioner nonetheless argues that the adoption of the Indian Reorganization Act ("IRA"), Act of June 18, 1934, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479), the 1948 addition of a definition for Indian country in 18 U.S.C. § 1151, and *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), counsel against the "continued viability" of the proviso. Cross-Petition at 7; Memorandum of Respondent at 3-5. However, nothing in the IRA, the 1948 recodification of Title 18 of the United States Code, or *Moe* suggests that the taxation authorization in the first proviso has been repealed impliedly.

Although the IRA terminated further allotment of reservation lands and extended indefinitely trust periods as to allotments previously made but as to which fee patents had not issued (25 U.S.C. §§ 461, 462), the statute contained no provision affecting the status of allotted lands previously patented in fee. Since Congress knew the effect of a fee patent's issuance on the taxable status of the involved land, it thereby elected to maintain the then-existing distinction between fee and trust lands for

[11]*E.g.*, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987); *Washington v. Confederated Tribes of Colville Indian Res.*, 447 U.S. 134, 163-64 (1980); *Bryan v. Itasca County*, 426 U.S. 373, 375-77 (1976); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

state and local taxation purposes, providing only that land acquired in trust by the Secretary for tribes or individual members would be exempt from such taxation. 25 U.S.C. § 465.[12] Thus, the IRA's termination of the

[12]As initially proposed by the Department of the Interior, the IRA would have made significantly more substantive changes in existing law than the finally enacted statute. *See, e.g.*, Furber, *Two Promises, Two Propositions: The Wheeler-Howard Act as a Reconciliation of the Indian Law Civil War*, 14 U. Puget Sound L. Rev. 211, 240-52 (1991); Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 Mich. L. Rev. 955, 961-69 (1972). Yet, even under the original bill there was implicit recognition of the taxable status of previously allotted lands as to which fee patents had issued and no provision for modifying such status. H.R. 7902, 73d Cong., 2d Sess., title III, § 7 (1934), *reprinted in Readjustment of Indian Affairs* at 9 (authorizing the Secretary, "in the case of trust or other restricted lands or lands to which fee patents have hitherto been issued to Indians and which are unencumbered, to accept voluntary relinquishments of, and to cancel the patent or patents or any other instrument removing restrictions from the land"). Another provision of the bill would have permitted the Secretary to establish new reservations or expand existing ones, with the newly acquired lands not subject to taxation "so long as title to them is held by the United States or by an Indian tribe or community[.]" *Id.*, title III, § 16, *reprinted in Readjustment of Indian Affairs* at 11. The latter provision, recognizing the fiscal impact of removing such lands from the tax base, further obligated the United States to "assume all governmental obligations of the State or county in which such lands are situated with respect to the maintenance of roads across such lands, the furnishing of educational and other public facilities to persons residing thereon, and the execution of proper measures for the control of fires, floods, and erosion, and the protection of the public health and order in such lands" or to enter into agreements with state or local governments for such services under which those governments would be compensated for their expenses. The absence of any reference to the taxable status of allotted land subsequently patented in fee was hardly an oversight, since the Meriam Report submitted to the Secretary of the Interior

(continued...)

allotment process did not impliedly repeal the removal of restrictions against taxation in the first proviso of section 6; indeed, finding such a repeal would be directly inconsistent with *Mahnomen County* and *Squire* which both indicated the continuing validity of the proviso after the IRA's passage in 1934. *See Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 423 (1989) (plurality opinion) ("[A]lthough the [IRA] may have ended the allotment of further lands, it did not ... prevent already allotted lands for which fee patents were subsequently issued from thereafter passing to non-Indians"). The voluntary nature of IRA coverage, finally, would mean that the proviso is inoperative on only those reservations accepting the statute's provisions -- a result hardly consonant with common sense. 25 U.S.C. § 478; *see* II F. Prucha at 964-65 (258 IRA elections held, with 181 tribes voting for and 77 tribes voting against coverage;

[12](...continued)
had identified state and local property taxes as "without doubt ... an important factor in causing the loss of Indian lands by so large a proportion of those Indians who have been declared competent." Institute for Gov. Research, *The Problem of Indian Administration* 477 (1928). Indeed, Senator Wheeler -- the chairman of the Senate Committee on Indian Affairs and a sponsor of the legislation eventually enacted as the IRA -- evinced substantial knowledge of *Choate* and later section 6 consent decisions during questioning of the Department of the Interior's acting Solicitor. *To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearings on S. 2755 and S. 3645 Before Senate Committee on Indian Affairs*, 73d Cong., 2d Sess. 185-91 (1934); *see also id.* at 270 (legal analysis submitted by Commissioner of Indian Affairs discussing congressional power to subject Indian property to state taxation); *id.* at 320-21 (1934 Washington *Post* article authored by Commissioner of Indian Affairs describing operation of the General Allotment Act and its effect on landownership).

14 other tribes did not hold elections and therefore were deemed covered).

The 1948 recodification of Title 18 of the United States Code also says nothing about the continuing validity of the first proviso. Even if one assumes that the definition of Indian country in 18 U.S.C. § 1151 determines the geographical area in which special federal Indian law preemption principles apply,[13] those principles were used by the Court of Appeals in determining that the proviso constitutes an express authorization for application of the ad valorem tax. Neither the language of § 1151 nor its legislative history[14] remotely hints that by inclusion of all reservation lands, whether fee patented or not, within the definition of Indian country Congress intended to undo the explicit consent to state taxation in the proviso. The Court of Appeals was wholly correct,

[13]*See Cabazon*, 480 U.S. at 207 n.5; *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975). *Cabazon* and *DeCoteau* involved civil regulatory or adjudicatory issues arising within the boundaries of admitted or claimed reservations; whether federal Indian law preemption principles apply in full force in non-reservation Indian country is an issue which has not been addressed by the Court and which has caused some difficulty to state courts. *See Housing Authority of Seminole Nation v. Harjo*, 790 P.2d 1090 (Okla. 1990); *General Motors Acceptance Corp. v. Chischilly*, 628 P.2d 683 (N.M. 1981). Presently, of course, only reservation areas are affected by the challenged state ad valorem tax.

[14]The only legislative history associated with the definition of Indian country is an explanation for the proposed addition of § 1151 in the House report accompanying the recodification bill. H.R. Rep. No. 306, 80th Cong., 1st Sess. A91-A92 (1947). The report commented that "[t]his section consolidates numerous conflicting and inconsistent provisions of law into a concise statement of applicable law" and identified the decisions from which the several elements of the definition were derived. *Id.*

therefore, in deeming § 1151 irrelevant to the validity of the Washington property tax. 903 F.2d at 1215; Petition at 20a - 21a.

The last contention -- that *Moe* held the first proviso impliedly repealed -- finds no support in the text or logic of the decision. The Court rejected there the quite broad claim that section 6, insofar as it made allottees subject to all state civil and criminal law upon receipt of a fee patent, sanctioned application of state personal property taxes on property owned by Indians within the reservation, state vendor license fees applied against Indians conducting cigarette businesses on reservation land, and state cigarette sales taxes with respect to on-reservation transactions between Indians. 425 U.S. at 480-81. *Moe* is inapposite for several reasons. First, the state appellants in that case were attempting to tax all Indians and not merely allottees, and their reliance on the first sentence in section 6 was accordingly overbroad at best. The petitioner/cross-respondent here seeks to tax lands specifically referred to in the first proviso. Second, as the Court observed, giving literal application to the first sentence proved too much since later legislation had in specific instances, such as criminal jurisdiction, clearly superseded application of state law. No such legislation, however, even tangentially touches upon the proviso's removal of restrictions against taxation of allotted fee-patented lands. Third, and most important, because *Moe* was concerned only with the first sentence in section 6 and because taxation of allotted fee lands was not germane, the Court had no cause to address the proviso. Its general comments concerning the post-allotment period congressional approach to civil regulatory matters can thus hardly be elevated to judicial repeal of

a provision which Congress itself has left unaltered and which was not implicated by the questioned state taxes.[15]

"The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *accord Pittsburgh & Lake Erie Railroad Company v. Railway Labor Executives' Association*, 491 U.S. 490, 510 (1989); *Traynor v. Turnage*, 485 U.S.

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[15]In urging the cross-petition be granted, the United States argued that, "if the principal clause of Section 6 is insufficient to authorize state taxation of Indian property and transactions within a reservation's boundaries ..., it is reasonable to assume that a mere proviso to the principal clause likewise is insufficient to permit state taxation." Brief for the United States as Amicus Curiae at 11. Nevertheless, merely because the "principal clause" might be deemed insufficiently explicit to render such lands taxable when owned by a tribe or its members does not warrant ignoring what the first proviso unequivocally states. The proviso was designed, when viewed in the overall context of the General Allotment Act, as the means for allowing the Secretary to truncate the 25-year trust period and to eliminate any doubt that, once the fee patent issued, the restrictions on alienation, encumbrance and taxation which had existed by virtue of the land's trust status were removed. While included within section 6, the proviso therefore had more direct relevance to section 5, which established the trust period and prohibited, either expressly or impliedly, alienation and taxation during such period. *See generally* 2A N. Singer, *Statutes and Statutory Construction* § 47.09, at 137-38 (4th ed. 1984) ("The old rule states that the proviso was limited to the section to which it was allocated, or the sections which preceded it. This rule is seldom followed today. Courts have adopted the rule that the proviso will be applied according to the general legislative intent and will limit a single section or the entire act depending on what the legislature intended or what meaning is otherwise indicated. ... No presumption concerning the scope of its application arises from the location of the proviso") (footnotes omitted).

535, 551 (1988). Even though "the standard principles of statutory construction do not have their usual force in cases involving Indian law" (*Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985)), there must be at least some textual support in later statutory enactments for implied repeal of an earlier statute.[16] No decisional authority suggests the anomalous concept -- upon which the respondent/cross-petitioner's attack on the property tax is ultimately premised -- that a mere change in general congressional approach, like termination of the allotment process, automatically invalidates all statutory provisions associated with the earlier policy. Absent the necessary textual predicate for implied repeal of section 6's first proviso, the Washington ad valorem tax must be sustained insofar as it has been or will be applied to allotted lands for which the patents have issued, irrespective of whether those lands are owned by the respondent/cross-petitioner or its members. No such textual predicate has been identified here.

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[16]The Court did not reach the question of implied repeal in *Blackfeet*, holding only that the authorization to tax in the Act of May 29, 1924, 43 Stat. 244 (codified at 25 U.S.C. § 398), did not extend to leases executed under the Omnibus Indian Mineral Leasing Act, Act of May 11, 1938, 52 Stat. 347 (codified as amended at 25 U.S.C. §§ 396a-396g). 471 U.S. at 766-68. It left open the issue whether the later statute, by virtue of its general repealer provision, voided the earlier tax authorization with respect to leases issued under the 1924 Act or the Act of February 28, 1891, 26 Stat. 795 (codified at 25 U.S.C. § 397). 471 U.S. at 767 n.6. The IRA contained no repealer provision, while the Title 18 recodification statute specified those provisions of Title 25, which did not include 25 U.S.C. § 349, repealed or amended by its enactment. Act of June 25, 1948, §§ 3, 21, 62 Stat. 683, 859, 862.

II. THE PLURALITY OPINION IN *BRENDALE* HAS NO RELEVANCE TO THIS MATTER.

There is no dispute among the parties and amici curiae that resolution of the statutory construction issue relating to section 6 should end the inquiry here. *E.g.*, Memorandum of Respondent at 2-3; Brief for the United States as Amicus Curiae at 18. Their agreement in this regard is well founded.

The demonstrably serious impact-test in *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 430-31 (1989) (plurality opinion), recognized administrative or judicial recourse for a tribe to vindicate a "protectible interest" allegedly prejudiced by state regulation of nonmember-owned property. As an ordinary matter, however, the interest-balancing standard articulated first in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980), governs when a state attempts to regulate on-reservation affairs of tribes or their members. The interest-balancing standard, in turn, is superseded by the clearly authorized requirement if the regulation involves state taxation of tribal or tribal member property or transactions. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987). Consequently, if the petitioners/cross-respondents prevail with respect to the section 6 proviso issue, the Washington ad valorem tax may be applied and, if the respondent/cross-petitioner prevails on such issue, the tax will be preempted. In either instance there is no room for *Brendale*-type analysis.

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CONCLUSION

The amici curiae States respectfully request that the Washington ad valorem tax be deemed applicable to all lands allotted pursuant to the General Allotment Act as to which fee patents have issued. They further request that the Court of Appeals' judgment be reversed to the extent it remanded for further evidentiary hearings the question whether application of such tax imperils the respondent/cross-petitioner's political integrity, economic security, health or welfare.

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